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No. OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE, *Petitioners*

v.

HOUSTON JONES, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 26 F.3d 727. The opinion of the district court (App., *infra*, 4a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1994. The petition for a writ of certiorari therefore is due on or before September 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT

Petitioners are law enforcement officers who were sued under 42 U.S.C. § 1983 for the allegedly excessive use of force. They sought summary judgment on good faith immunity grounds, asserting that their actions did not violate clearly established law because there was no evidence that their conduct was inconsistent with *any* legal standard. The district court denied the motion. The court of appeals then held that it lacked jurisdiction to entertain petitioners' interlocutory appeal. This holding is squarely inconsistent with the decisions of other Circuits, is in tension with the rulings of this Court, and threatens to frustrate the purposes of the qualified immunity doctrine. Further review therefore is in order.

1. On November 6, 1990, John Heidelmeier, an officer of the Villa Park, Illinois, police department, responded to a report of an apparently intoxicated man in or near an intersection. When Heidelmeier arrived at the scene he found plaintiff beating his head or forehead against the door of a building. Although some subsequent facts are in dispute, it is clear that an altercation ensued and that Heidelmeier attempted to arrest and handcuff respondent. Four more Villa Park police officers (the three petitioners here and Genaro Esposito) soon arrived and assisted Heidelmeier in handcuffing respondent. App., *supra*, 5a. After arriving at the police station respondent was treated for trauma and several broken ribs. *Ibid.*

Respondent subsequently was charged in state court with the criminal offenses of disorderly conduct, battery, and resisting arrest; he asserted as a defense that he lacked the requisite mental state for the offenses charged because he was suffering an adverse insulin reaction at the time of his arrest. App., *infra*, 6a. He testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed that he was being dragged up the stairs of the police station. The state trial court

> found that [respondent] came into contact, struck, and resisted a peace officer. Although the judge found [petitioners'] testimony credible and felt that all other elements of the charges against [respondent] had been

> proven, he concluded that the State had not proven beyond a reasonable doubt that [respondent] acted knowingly. The basis of the finding as to mental state was the testimony concerning [respondent's] diabetes and insulin shock.

Ibid.

Respondent then brought this 42 U.S.C. § 1983 action in the United States District Court for the Northern District of Illinois against petitioners, Heidelmeier, and Esposito. In relevant part, respondent alleged that the officers used excessive force against him and that they were responsible for an illegal arrest, false imprisonment, and malicious prosecution. The officers testified that no one beat, struck or abused respondent during the arrest; the three petitioners also testified that their involvement with respondent ended after the arrest was effected and that they saw no one abuse respondent at the police station. App., *infra*, 5a. Respondent, in contrast, while asserting that he had been beaten at the time of arrest and at the police station, testified that he was experiencing an insulin reaction when arrested and therefore "disclaim[ed] recollection of specific actions taken by defendants." *Id.* at 6a. He did deny resisting arrest (*ibid.*) and said he recalled seeing Heidelmeier and Esposito while being beaten at the police station. *Ibid.*[1]

All of the defendants sought summary judgment, arguing as to the excessive force claim that there was absolutely no evidence that they had abused respondent; as for the false arrest and related claims, the defendants contended that the existence of probable cause for arrest established their qualified immunity from suit. The district court denied the motion. On the claim of excessive force, the court concluded that "[p]laintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the

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[1] Respondent's doctor testified that respondent probably would have been weakened by an insulin reaction, but that in a small percentage of cases "a person undergoing an insulin reaction may show greater than normal strength." App., *infra*, 6a. The motor deficit from the reaction would resemble that caused by intoxication. *Ibid.*

case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed." App., *infra*, 8a. The court also held that the false arrest claim should be tried, finding "there is at least some possibility plaintiff could prove lack of probable cause." *Id.* at 10a.

2. Petitioners (but not Heidelmeier and Esposito) filed an interlocutory appeal challenging the denial of summary judgment; as the court below explained, the appeal "assert[ed] the defense of official immunity." App., *infra*, 1a. The court of appeals, however, dismissed the appeal as to the excessive force claim for lack of jurisdiction. The court noted that petitioners "are contending that they did not commit the acts of which plaintiff accuses them" and held that "[d]efendants do not deny that *if* they beat the plaintiff * * * then they lack immunity. *Whether* they beat the plaintiff is a question that must be resolved in the district court before it may be reviewed on appeal." *Id.* at 2a (emphasis in original). The court premised this holding on the conclusion that "[a] cry of 'we didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." *Id.* at 1a-2a.[2]

The court's holding in this case followed from its prior decision in *Elliott* v. *Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992), that "defendants may urge only legal issues" on interlocutory qualified immunity appeals. App., *infra*, 1a. In *Elliott*, the court had reasoned that "the interlocutory appeal to vindicate the [qualified immunity] right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged." 937 F.2d at 341. The rule announced in *Elliott*, and applied in this case, therefore is that a defendant may appeal on grounds of qualified immunity only when he contends

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[2] The court did, however, reverse the district court's denial of summary judgment on the false arrest claim. It found from the undisputed evidence that probable cause to arrest existed and held that the district court erred in denying the motion on the ground that "the plaintiff might come up with more evidence before trial." App., *infra*, 2a.

"that he acted in the shadow of legal uncertainty"; such an appeal is not cognizable in the Seventh Circuit when the defendant's argument is that he "had nothing to do with the events of which [the plaintiff] complains." *Id.* at 342. The court therefore remanded this case for trial.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of considerable practical importance. The law enforcement petitioners in this case moved for summary judgment, asserting that they were entitled to qualified immunity because plaintiff failed to establish that their actions had violated clearly established law -- or, indeed, that their actions had violated any law at all. The Seventh Circuit's decision that the district court's denial of such a motion may not be challenged in an interlocutory appeal is irreconcilable with the express contrary holdings of at least five other Circuits. It also is in clear tension with this Court's repeated recognition that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Because that decision threatens to impose substantial additional burdens on public officials by precluding "the dismissal of insubstantial suits without trial" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)) — a principal purpose of the qualified immunity doctrine — review by this Court plainly is warranted.

A. The Decision Below Cannot be Reconciled With the Holdings of Other Courts of Appeals

The court below held that "defendants may urge only legal issues" in interlocutory immunity appeals, opining that "[a] cry of 'we didn't do it' does not present a distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." App., *infra*, 1a-2aa. The Seventh Circuit therefore is of the view that "interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty," reasoning that it is inappropriate for immunity claims to turn on the appellate court's "comb[ing] through the factual record." *Elliott*, 937 F.2d at 341. That precise conclusion,

however, has been *expressly* rejected by at least five courts of appeals — the First, Fourth, Eighth, Ninth and Tenth. And the District of Columbia Circuit has *exercised* appellate jurisdiction over interlocutory immunity appeals where the gist of the defendants' argument was the factual one that they did not commit the constitutional tort. The decision below cannot be reconciled with these decisions.[3]

1. a. In *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), the First Circuit addressed a state prisoner's Section 1983 claim that the defendant police officers beat him while quelling a prison disturbance. See *id.* at 127. The district court had denied the defendants' motion for summary judgment on qualified immunity grounds. On interlocutory appeal, the defendants' "main arguments [were] that the undisputed facts gathered through discovery show that they could not have violated clearly established law *because they had no contact, or only minimal contact, with [the plaintiff]*, or that any contact with him was no more than the result of their good faith efforts to quell a prison disturbance." *Ibid* (emphasis added). The court of appeals thus posed "[t]he question before us [as] whether, in light of th[e] [discovery] materials [before the district court], the district court erred in finding a genuine issue of material fact as to defendants' entitlement to qualified immunity." *Id.* at 128.

In analyzing the case, then-Chief Judge Campbell, writing for the court, began by explaining that the constitutional law governing the defendants' conduct was "clearly established" at the time of the events giving rise to the suit. 863 F.2d at 129. But the court nevertheless went on to hold that the exercise of appellate

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[3] This Court's denial of certiorari in *Elliott* should not be taken as an indication that review of the issue presented here is unwarranted. To the contrary, the respondent in that case opposed certiorari principally on the ground that the case had become moot during the pendency of the petition because the plaintiff's claims had been tried and a verdict returned on the merits in petitioners' favor. See Br. in Opp., No. 91-690, at 1-4. While respondent in *Elliott* also urged the Court to deny review on the ground that the decision was correct, he acknowledged that the Seventh Circuit had decided "an issue of importance to section 1983 plaintiffs, as to which the Courts of Appeals have disagreed." *Id.* at 1.

jurisdiction was appropriate under *Anderson* v. *Creighton*, 483 U.S. 635 (1987), and *Mitchell*, accepting the defendants' submission that "'the qualified immunity right not to stand trial is just as effectively lost if an appellate court does not entertain an appeal of a legally erroneous denial of summary judgment as it is if the district court declines to rule itself on the summary judgment motion.'" *Id.* at 132. The court therefore "conclude[d] that we have jurisdiction to review a district court's denial of qualified immunity on grounds that a genuine issue of material fact exists as to the factual predicate of a qualified immunity claim." *Ibid.*

The court then proceeded to the merits, explaining that "[f]inding that we have jurisdiction to do so, we now address the question of whether, reading the pretrial record in the light most favorable to [plaintiff], a genuine issue of material fact exists as to whether defendants' conduct violated [plaintiff's] clearly established rights." 863 F.2d at 133. After a close review of the record (see *id.* at 134-136), the court found that such an issue of fact existed as to several defendants because "all admit having physical contact with [plaintiff] during the time [plaintiff] was repeatedly beaten." *Id.* at 134. But the court also held that two other defendants (Campbell and Furlone) were entitled to qualified immunity because "there is no evidence at all in the record showing that [Campbell] had any contact with [plaintiff]" and Furlone "likewise had no physical contact with [plaintiff]." *Id.* at 133. "*Because the undisputed facts show that Furlone and Campbell did not cause [plaintiff's] injuries*, their conduct did not violate clearly established law and thus they are entitled to qualified immunity." *Ibid* (emphasis added) (footnote omitted).

Indeed, as to these latter two defendants the court specifically explained:

> This is a case where it has been shown not only that these two defendants did not violate law *clearly established* at the time of the event, but did not violate the law *at all*, then or now. It might be argued that defendants' right to prevail "on the merits" forecloses their right to prevail on qualified immunity, thus barring the present interlocutory appeal. However, "the merits" and the issue of qualified immunity are inexorably

> intertwined in this instance. To afford the two defendants immunity only if the law had been a little less favorable to them would seem ridiculous.

Id. at 133 n.9 (emphasis in original).

The First Circuit's holding that interlocutory appellate jurisdiction exists to consider Section 1983 defendants' claims of (as the court below put it) "we didn't do it" was in no sense off-hand or ill-considered. To the contrary, the court rejected the dissenting view of then-Judge Breyer that "a defendant is not entitled to a 'qualified immunity' interlocutory appeal in respect to a pure fact-based 'evidence sufficiency' ruling." 863 F.2d at 139 (Breyer, J., dissenting). Judge Breyer explained — quite correctly — that there was "no real issue on appeal, in respect to the defendants Campbell and Furlone, other than the purely factual issue whether the evidence shows that they were present at the time plaintiff was hurt." *Id.* at 141. This, he believed, "is not an appropriate issue for us to resolve on an interlocutory appeal." *Ibid.*[4] The majority, of course, established the contrary view as the law in the First Circuit.

Unwin therefore is indistinguishable from this case. In both, the plaintiff alleged that he was beaten by defendants. In both, the constitutional rule — beatings are impermissible — was clearly established at the time of the challenged conduct. In both, the defendants claimed that they were entitled to qualified immunity because, as a factual matter, they had no contact with the plaintiff. But in this case, the court held that it lacked appellate jurisdiction; in *Unwin*, the court held that it *had* jurisdiction and proceeded to address the merits of the defendants' factual claims.

b. The First Circuit has adhered to this approach consistently. In *Caro* v. *Aponte-Roque*, 878 F.2d 1 (1st Cir. 1989), the plaintiff challenged an assertedly retaliatory discharge; claiming immunity, the defendant denied liability on the wholly factual ground that he lacked a retaliatory motive. Then-Judge

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[4] Then-Judge Breyer acknowledged, however, that "[t]he Supreme Court has not directly focused upon this question." 863 F.2d at 137 (discussing *Mitchell*); see *id.* at 138 (discussing *Anderson*).

Breyer, now writing for the court, noted that the law governing retaliatory discharges was settled and that "[t]he *only* issue in the case concerns motive." *Id.* at 2 (emphasis in original). And relying on *Unwin*, the court restated the holding that a "court should examine evidence in respect to factual issues on interlocutory appeal of a denial of summary judgment." *Ibid.* The court therefore explained that "[t]he single question that we must decide is whether the plaintiffs, in opposing the [defendant's] motion for summary judgment, demonstrated the existence of a 'genuine' and 'material' issue of fact warranting the district court's proceeding to trial on the 'qualified immunity' question." *Ibid.* After a careful review of the record (see *id.* at 3-4), the court held that a genuine issue of material fact did exist.

Similarly, in *Rogers* v. *Fair*, 902 F.2d 140 (1st Cir. 1990), the plaintiff claimed that prison authorities discriminated on the basis of religion in denying him a furlough. The defendants' motion for summary judgment on immunity grounds was denied. As the court described the case,

> Appellants ask us to reverse the denial of summary judgment because *there is no evidence that their conduct could have violated the rights of the plaintiff even if those rights were clearly established.* * * * *The only question, therefore, is whether the plaintiff has presented sufficient facts to survive summary judgment on the issue of whether the religion of the sponsors was improperly considered in the denial of furlough.* Because plaintiff, the nonmoving party, has failed to meet the normal summary judgment standard, we reverse and grant summary judgment to the defendants.

Id. at 142 (emphasis added). Relying on *Unwin*, the court noted that, assuming the governing constitutional law was settled, the plaintiff "must present more than mere [factual] allegations. He has not done so." *Id.* at 143. The court added that "[w]e have scoured the record on summary judgment and find no facts that [plaintiff] can use to support his allegations." *Ibid.* The court therefore granted judgment for the defendants.

Most recently, in *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994), the court reaffirmed that, when the

defendant appeals from the denial of a summary judgment motion asserting good faith immunity, "we must determine whether the plaintiffs have introduced sufficient evidence to create a genuine issue of material fact that [the defendants] violated [plaintiff's] constitutional rights." *Id.* at 91. The case involved a claim that a police superintendent and mayor failed adequately to supervise and train law enforcement officers; after a careful review of the record (see *id.* at 92-94), the court reversed and granted summary judgment because plaintiffs "failed to produce sufficient evidence to create a triable issue." *Id.* at 94. See *id.* at 95 ("the plaintiffs have not proffered any evidence that [the defendant] had actual or constructive knowledge of any training or supervisory deficiencies"). There was no suggestion that the controlling constitutional law was unclear.

2. The Eighth Circuit reached an identical conclusion in *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986). There, the plaintiff brought a Section 1983 action claiming that he had been discharged in retaliation for the exercise of his First Amendment rights; "[d]efendant's motion for summary judgment was based on the argument that there was no substantial evidence to support this theory." *Id.* at 202-203.

Writing for the court, Judge Arnold noted that "there is no doubt that the right to be free from official retaliation for the exercise of First Amendment rights has been clear all along." 800 F.2d at 203. Judge Arnold accordingly explained that

> The question presented is thus both less clearly "legal," as opposed to "factual," than the issue in *Mitchell*, and less clearly separable from the merits, one of the requirements for immediate appealability under *Cohen*. We nevertheless hold that an interlocutory appeal is proper. If this is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion. It is important for public officials to be shielded from the burden of trial on insubstantial claims. Their right not to be forced to trial will be lost if an immediate appeal is not allowed. And the issue is, on close analysis, separable from the merits. To put it in terms of the present case, *the issue is not*

> *whether defendant was improperly motivated in fact, but, rather, whether, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury, of improper motivation.* There is a sense in which this sort of question is one of "law," just as the question whether someone is entitled to a directed verdict is in some sense one of "law."

Id. at 203 (emphasis added).

With this standard in mind, the court went on to review the record. It found that "[p]laintiff points to no evidence that [the defendant's] motivation was unconstitutional." 800 F.2d at 204. The court therefore concluded that "the record simply does not create a genuine issue of material fact." *Id.* at 205. It accordingly reversed the district court's judgment and directed dismissal of the complaint. *Ibid.* Again, that case is not distinguishable from this one: the controlling law was settled, and the only issue was a factual one (to paraphrase the Seventh Circuit's words, the defendant's claim of "I didn't think it"). And again, the Eighth Circuit found jurisdiction proper; the Seventh Circuit did not.

Like the First Circuit, the Eighth Circuit has consistently adhered to this approach. Thus in *Tagstrom* v. *Enocksen*, 857 F.2d 502 (8th Cir. 1988), the plaintiff alleged that defendant exhibited deliberate indifference to the medical needs of a person injured in a high speed chase. The district court denied a motion to dismiss on immunity grounds, finding that there was "circumstantial evidence" of indifference. See *id.* at 503. The court of appeals reversed. Reviewing the discovery materials, the court found that "[t]here is nothing in the record to indicate that [the defendant] deprived [plaintiff] of any constitutional right" because defendant was, as a factual matter, "in no way deliberately indifferent to [plaintiff's] medical needs." *Id.* at 504, 503. The court therefore held that "'[t]he facts shown by [the plaintiff] simply do not create a triable issue of fact.'" *Id.* at 504, quoting *Wright*, 800 F.2d at 205.

The Eighth Circuit's other decisions in the area also have hewed to *Wright*. See *Kelly* v. *Bender*, 23 F.3d 1328, 1330 (8th Cir. 1994) (citing *Wright*, "[w]e have jurisdiction over this appeal because, although largely fact-based, it presents the legal question

whether [plaintiff] raised a genuine issue of material fact regarding whether the [defendants'] conduct violated his clearly established rights"); *Johnson-El* v. *Schoemehl*, 878 F.2d 1043, 1050 (8th Cir. 1989) (plaintiff sued mayor, along with other public officials, challenging conditions in municipal jail; on appeal from denial of motion for summary judgment on good faith immunity grounds, court held that "we require that the plaintiffs point to some specific action or particular form of inaction which would make the mayor liable under [the settled] standard. * * * Plaintiffs have failed to do so in their amended complaint or supplementary materials. We therefore grant summary judgment for [the] Mayor."); *Anderson v. Roberts*, 823 F.2d 235, 237-38 (8th Cir. 1987) (court found that the legal standards applicable to plaintiffs' claim that defendant had inadequately trained his subordinates were clear, and that the question before the court was whether defendant had "engaged in any conduct in violation of that clearly established law"; following *Wright*, the court found that it had appellate jurisdiction).

3. The Ninth Circuit has likewise held that interlocutory appellate jurisdiction lies to determine "whether, after discovery, [plaintiff] made a sufficient evidentiary showing of the occurrence of the alleged conduct to create factual issues requiring trial." *Burgess* v. *Pierce County*, 918 F.2d 104, 105 (9th Cir. 1990). In *Burgess*, another case involving a claim of retaliatory discharge, the court found that the governing constitutional law was "clearly established" at the time of the conduct giving rise to the suit. *Id.* at 106. The court went on to hold that, "[s]ince [defendant's] summary judgment motion was denied after discovery, we must also *determine whether the trial court correctly held [plaintiff] had presented a genuine issue of fact as to whether defendants had engaged in the alleged conduct* violating plaintiff's clearly established constitutional right." *Ibid.* (emphasis added).

Expressly addressing the question of appellate jurisdiction, the court explained that "[t]his review is proper under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). * * * All circuits facing the issue have held that on appeal from a denial of summary judgment after discovery *the court must consider whether there is a genuine issue of fact as to whether defendant engaged in the conduct* violating plaintiff's clearly established constitutional right." 918

F.2d at 106 n.3 (emphasis added). The court proceeded to engage in a close review of the record (see *id.* at 106-107 n.4) before concluding that the plaintiff in that case had "made a sufficient evidentiary showing to create a genuine issue of material fact as to his allegations." *Id.* at 106. It therefore is no surprise that the Ninth Circuit has very recently cited *Burgess* for the proposition that "[d]efendants are entitled to summary judgment based on qualified immunity if * * * there is no genuine issue of material fact as to whether defendant engaged in conduct violating plaintiffs' clearly established constitutional rights." *Armendariz* v. *Penman*, 1994 WL 393477 (9th Cir. Aug. 1, 1994), at *2.

4. The Tenth Circuit has expressly endorsed this approach. In *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), a *Bivens* action, that court concluded that *Anderson* "compels us to take an appeal * * * in all cases in which the denial [of summary judgment] is grounded upon a finding that disputed material facts exist in the case." *Id.* at 719. The court explained that the Eighth Circuit's decision in *Wright* "illustrates the problem and the proper resolution." *Ibid.* As the Tenth Circuit characterized it, "[i]n *Wright*, plaintiff sued his health center employer, alleging that the employer violated his First Amendment rights by firing him in political retaliation. The constitutional right at issue was clearly established; what the parties disputed on interlocutory appeal, which the Eighth Circuit allowed, was whether sufficient evidence supported the claim that defendant's acts were improperly motivated." *Ibid.*

The Tenth Circuit applied this principle in *Austin* v. *Hamilton*, 945 F.2d 1155 (10th Cir. 1991), which involved a *Bivens* claim of unjustified detention. Relying on *DeVargas*, the court took jurisdiction over an immunity appeal "even though the district court based its denial of the [summary judgment] motion on a finding that disputed material facts exist in the case." *Id.* at 1157. The court explained that at least some of the immunity claims in the case "do not implicate unsettled law," but rather turned on what the court characterized as the factual question of the reasonableness of the length of plaintiffs' detention. *Id.* at 1162. After reviewing the record, the court went on to hold that "under the circumstances of this case, in which the specific facts are unsettled and disputed regarding both the length [of detention] and the reasons for the

delay [in releasing plaintiffs], the district court's denial of summary judgment was proper." *Id.* at 1162-1163 (footnote omitted).

5. The Fourth Circuit has reached the same conclusion. In *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988), the plaintiff brought a Section 1983 action alleging that a series of administrative searches of his bar violated the Fourth Amendment; the district court denied the defendants' motion to dismiss on the factual ground that "the record raised a triable issue as to whether improper motives on the part of the defendants rendered the series of bar checks a violation of the plaintiffs' clearly established property right." *Id.* at 442. The Fourth Circuit found that it had jurisdiction to entertain the appeal.

In an opinion by Judge Wilkinson, the court held that "[w]here the acts alleged by the plaintiff do constitute a violation of clearly established rights, a defendant is entitled to summary judgment [on immunity grounds] if the record does not create a genuine issue as to whether the defendant in fact committed those acts." *Id.* at 443. The court went on to hold that appellate jurisdiction existed to review the denial of such a summary judgment motion; relying on *Wright*, the Fourth Circuit explained that "we must inquire 'whether, when all the facts are viewed in the light most favorable to the plaintiff, there is a genuine issue, triable to a jury,' of a clearly established constitutional violation." *Id.* at 444. Without suggesting that the controlling constitutional law was unsettled, the court of appeals proceeded to engage in this inquiry. It concluded that "on this record [two defendants] are not entitled to qualified immunity and that an issue of triable fact as to these defendants' violation of settled Fourth Amendment principles appears to have been presented" (*id.* at 447) because those defendants may have engaged in a pattern of harassing searches (see *id.* at 445, 447). The court also found that, as to three other defendants, "the summary judgment record establishes their entitlement to qualified immunity" (*id.* at 447) because, as a factual matter, they were involved only in small numbers of searches (see *ibid*) or because "[n]either the allegations nor the affidavits in the record suggest that [they were] involved" is harassing conduct. *Id.* at 448.

6. In addition, the District of Columbia Circuit, while not explicitly addressing the issue of appellate jurisdiction, has

exercised jurisdiction over an appeal challenging the denial of a fact-based summary judgment motion asserting qualified immunity. In *Martin* v. *D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir.), vacated in part and en banc rehearing granted, 817 F.2d 144, original opinion reinstated, 824 F.2d 1240 (1987), the plaintiff brought a *Bivens* action asserting that federal law enforcement officers conspired to deny him both access to the courts and due process. See 812 F.2d at 1427-1428. The district court denied the defendants' motion for summary judgment on the ground that the controlling constitutional law was clearly settled. See *id.* at 1428. The court of appeals, in an opinion by then-Judge Ruth Bader Ginsburg, recognized that the law was indeed established, noting that "[a] reasonable law enforcement officer would surely know that an arrest or prosecution undertaken to deter an individual from pursuing bona fide civil claims would trample upon clearly established constitutional rights." *Id.* at 1432.

The court nevertheless went on to consider the defendants' factual claims. The court explained that the crucial element of the plaintiff's claim concerned the defendants' motive. 812 F.2d at 1431. After a close review of the record (see *id.* at 1435), the court concluded that plaintiff's evidence "was insufficient * * * to demonstrate the existence of a 'genuine issue' as to the reasonableness and good faith of the Capitol Police" (*ibid*); plaintiff's "fact recitations, as they now stand, are insufficiently probative of the alleged unconstitutional motive to warrant denial of the Capitol Police officers' motion for summary judgment." *Id.* at 1436. The court remanded the case to give the plaintiff an opportunity to adduce additional evidence on this factual issue. *Id.* at 1436-1438. The court nowhere suggested that it had any doubts about its jurisdiction to render this decision even though the appeal contained, in the Seventh Circuit's formulation, "nothing but a factual issue" (*Elliott*, 937 F.2d at 342) — whether defendants acted with a particular state of mind.[5]

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[5] Judge Starr, dissenting in part, also raised no doubts about appellate jurisdiction; to the contrary, he would have reversed the district court's decision outright and not remanded the case for further factual development. See 812 F.2d at 1442 (Starr, J., concurring in part and dissenting in part).

7. The issue presented here has caused considerable confusion in two other Circuits. In *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 111 S. Ct. 2827 (1991), the Third Circuit stated:

> Although we have not previously addressed this issue explicitly, we believe that we implicitly have held that *Anderson* requires appellate inquiry into whether the plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to whether the defendant official engaged in the conduct alleged to have violated a clearly established right. * * * We conclude that under *Anderson's* fact specific standard for qualified immunity, as construed and applied by our precedents, we must determine whether the district court properly denied defendants' claims of qualified immunity in part by analyzing the evidence adduced by plaintiff as to the conduct of the defendants.

Id. at 1111 (citations omitted). The court applied this principle to the qualified immunity claim of defendant Schwartz, whose primary defense was that he had not committed the acts alleged by the plaintiff: he asserted that his involvement in the events at issue was minimal and that defendant Grabowski was primarily responsible. See *id.* at 1112. The Third Circuit, reversing the district court, held that Schwartz was entitled to qualified immunity, largely because of his non-involvement in the events giving rise to the action. See *id.* at 1115-16, 1117 n.12. More recently, however, the Third Circuit, in *Giuffre* v. *Bissell*, 1994 WL 401389 (3d Cir. Aug. 4, 1994), at *18, relied on the Seventh Circuit's *Elliott* decision for the proposition that an "'I didn't do it' defense to [a plaintiff's] [constitutional] claim is not cognizable as a declaration of qualified immunity." The court made no attempt to reconcile its analysis with its prior holding in *Brown*.

Similarly, in the Sixth Circuit case of *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987), some of the defendants submitted affidavits stating that "they had no knowledge of and took no part in" the acts of misconduct alleged by the plaintiffs. *Id.* at 1158. Citing *Mitchell*, the Sixth Circuit held: "If these defendants did not participate in the actions that allegedly violated plaintiffs' rights,

then they cannot be liable as a matter of law. Therefore, this court has jurisdiction to entertain this contention of qualified immunity." *Id.* at 1159. But that court, in an unpublished opinion, also has cited *Elliott* for the principle that "[t]he essence of a qualified immunity defense is that what the actor is claimed to have done may be wrong under present standards, but that a reasonable actor would not have known it to be wrong at the time. The denial of a motion asserting a general defense on the merits is not subject to interlocutory appeal." *Stone* v. *Holzberger*, 1994 WL 175420 (6th Cir. Jan. 6, 1994), at *7 n.5. The court did not cite to, and made no attempt to distinguish, its contrary decision in *Ramirez*.[6]

8. Against this background, it is undeniable that there is an irreconcilable conflict in the Circuits. The Seventh Circuit has held that an interlocutory immunity appeal is cognizable only when the defendant "contend[s] that he acted in the shadow of legal

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[6] The law is unclear in two other Circuits. In *Kaminsky* v. *Rosenblum*, 929 F.2d 922 (2d Cir. 1991), upon which the Seventh Circuit relied in *Elliott* (see 937 F.2d at 342), the Second Circuit did state that an appeal "must be dismissed for lack of appellate jurisdiction" where it challenges the denial of summary judgment in a case involving "unresolved factual issues." 929 F.2d at 924. At the same time, however, the court went on to review the record, observing that "the district court concluded that the resolution of the immunity defense involved disputed factual questions unable to be resolved on summary judgment. We agree." *Id.* at 925. See *id.* at 927. It thus appears that the Second Circuit would accept jurisdiction in a case presenting no genuine dispute of fact. Similarly, the Eleventh Circuit held that an appeal was not permitted where the district court "denied defendants' claim of qualified immunity because the case required substantial factual development before it could be determined with finality whether [plaintiff] had been subjected to constitutional deprivation and if so, whether some or all of the defendants were entitled to the benefit of qualified immunity." *Riley* v. *Wainwright*, 810 F.2d 1006, 1007 (11th Cir. 1987) (per curiam). It is not clear whether the court believed interlocutory appeal improper when facts are in dispute or whether it simply concluded that the record did not permit resolution of the case on summary judgment. See also *Jasinski* v. *Adams*, 781 F.2d 843, 848 (11th Cir. 1986) (court entertained appeal and held that summary judgment was properly denied where there was a "factual dispute" on the existence of probable cause to search).

uncertainty" and "that *Mitchell* does not authorize an appeal to argue 'we didn't do it.'" *Elliott*, 937 F.2d at 342. See App., *infra*, 1a-2a. In contrast, the First, Fourth, Eighth, Ninth, and Tenth Circuits have expressly found appellate jurisdiction in cases where there was no legal uncertainty and the claim was no more and no less than "we didn't do it" (or, in the retaliatory discharge cases, that "we didn't have a bad motive when doing it"). The District of Columbia Circuit has exercised jurisdiction in identical circumstances. The question, which has now been litigated across the Circuits, plainly is an important one that arises with great frequency. In these circumstances, review by this Court is warranted.

B. The Decision Below is in Conflict With This Court's Decisions

1. Given the inconsistency of the Seventh Circuit's approach with the clear weight of authority in the courts of appeals, it is hardly a surprise that the decision below also is in clear tension with this Court's decisions. In fact, this Court has twice recognized that if, after discovery, the plaintiff has failed to uncover evidence that the defendant did what he was alleged in the complaint to have done, the defendant may obtain summary judgment on the basis of qualified immunity. In *Mitchell*, the Court held that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." 472 U.S. at 526. Similarly, in *Anderson*, the Court stated that "if the actions [the defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 646 n.6. The Court thus indicated that a summary judgment motion would lie after discovery.

Accordingly, qualified immunity protects the official whose actions did not violate clearly established law (see *Harlow*, 457 U.S. at 818), whether the reason is that the law was in a state of flux or simply that the official did not commit the acts alleged by

the plaintiff. The necessary implication of this conclusion is that an appeal should be available when such a summary judgment motion is denied. After all, *Mitchell* and *Anderson* indicate that a defendant is entitled to summary judgment *on qualified immunity grounds* if the plaintiff fails to adduce evidence creating a genuine issue of fact on the question whether the defendant committed acts that violated clearly settled law. And "because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability'" (*Hunter* v. *Bryant*, 112 S. Ct. 534, 536 (1992), quoting *Mitchell*, 472 U.S. at 526 (emphasis added by the Court)), the defendant should have an opportunity to test on appeal a wrongful denial of that entitlement by the district court.

Any other conclusion, as the First Circuit noted in *Unwin*, will lead to perverse results. We know from *Anderson* that the immunity inquiry must look to the particular conduct engaged in by the defendant. See 483 U.S. at 641. A court therefore must determine whether what the defendant *actually did* violated clearly established law; as the Seventh Circuit itself acknowledged (see *Elliott*, 937 F.2d at 342), every Circuit has rejected the rule of *Bonitz* v. *Fair*, 804 F.2d 164 (1st Cir. 1986), overruled by *Unwin*, 863 F.2d at 130-133, which had held that the courts of appeals could not look beyond the allegations of the complaint in reviewing the denial of a motion seeking summary judgment on immunity grounds. Instead, courts of appeals examine the entire summary judgment record.

So, for example, if a plaintiff alleges that the defendant engaged in a particular act (say, that he conducted a warrantless search) and the defendant responds that he conducted a different act altogether (say, that he obtained a warrant before conducting the search), the court will have to determine whether the plaintiff's version is supported by the record before determining whether the defendant's conduct was inconsistent with clearly established law. If the plaintiff's version finds no support in the record, the court will have to determine whether the conduct as described by the defendant violated clearly settled law. And there is no doubt that appeal would lie if the legality of the defendant's conduct had been unclear, because the question then would be whether the defendant had "acted in the shadow of legal uncertainty." *Elliott*, 937 F.2d at 342. In that light, it makes no sense at all to deny the defendant

an appeal because it was clear that his conduct was *legal*; "[t]o afford the * * * defendant[] immunity only if the law had been a little less favorable to [him] would seem ridiculous." *Unwin*, 863 F.2d at 133 n.9.

2. The Seventh Circuit nevertheless appeared to believe that an appeal from a denial of a qualified immunity summary judgment motion premised on such a defense is improper because it presents no issue different from the merits. The court reasoned that "there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial." *Elliott*, 937 F.2d at 341 (emphasis in original). As this Court recognized in *Mitchell*, however, "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." 472 U.S. at 528-29. This is so because "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28. And as the Eighth Circuit explained, "the issue is, on close analysis, separable from the merits. * * * [T]he issue is not whether defendant [engaged in the acts alleged] in fact, but, rather, whether, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury, of improper [conduct]." *Wright*, 800 F.2d at 203.

For similar reasons, the Seventh Circuit was wrong in reasoning that a defense that the defendant did not commit the acts alleged by the plaintiff raises factual issues that do not qualify for interlocutory appeal under *Mitchell*'s holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." 472 U.S. at 530. When there is no genuine issue of material fact, the defendant's entitlement to summary judgment *is* an issue of law under Fed. R. Civ. P. 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This principle applies to motions for summary judgment

based on qualified immunity just as much as it does to other summary judgment motions. See, *e.g.*, *Wright*, 800 F.2d at 203; *Martin*, 812 F.2d at 1434. A properly supported qualified immunity summary judgment motion based on a defense that the defendant did not commit the acts alleged by the plaintiff thus presents a "question of law." *Elder* v. *Holloway*, 114 S. Ct. 1019, 1023 (1994).

3. The policies underlying this Court's qualified immunity decisions would be thwarted by a rule precluding immediate appeal from the denial of a summary judgment motion, made after discovery, premised on the defense that the defendant did not commit the acts alleged by the plaintiff. One of the primary purposes of qualified immunity is to permit "the dismissal of insubstantial lawsuits without trial." *Harlow*, 457 U.S. at 814. "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation * * * only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). As a consequence, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 112 S. Ct. at 536.[7]

Surely, as a matter of policy, an official who did nothing even arguably wrong is at least as deserving of the interlocutory appeal authorized by *Mitchell* as is an official whose conduct was arguably, but not clearly, unconstitutional at the time he acted. And where the plaintiff cannot adduce any evidence establishing that the official committed the acts alleged, a motion for summary judgment should be granted, or the appeal of its denial allowed, to further the policy served by *Mitchell* of sparing the official and the courts the time and expense of a trial, the result of which is a foregone conclusion. "[T]he purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the

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[7] A governmental defendant's right not to stand trial is just as effectively lost if the court of appeals does not entertain an appeal from a legally erroneous denial of summary judgment, as here, as it is if the district court declines to rule on the summary judgment motion in the first place. *Unwin*, 863 F.2d at 132.

submission of facts to a jury." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J., sitting by designation) (citing *Mitchell*, 472 U.S. at 526).

The contrary rule announced by the Seventh Circuit, if allowed to stand, would have significant practical consequences. Cases like *Mitchell*, in which the constitutionality of the defendant's actions is genuinely unsettled at the time he acts, are relatively rare. More common are cases involving factually insupportable accusations by disgruntled plaintiffs, such as the allegations by respondent here. As this Court recognized in *Anderson*, *Mitchell*, *Davis*, and *Harlow*, such cases, if not expeditiously terminated, pose a substantial danger of chilling public officials in the legitimate exercise of their governmental duties. Yet it is appeals from precisely this class of cases that the court below has refused to entertain. This is a perverse result, for it forces the victims of the most insubstantial claims to go through trial.

In addition, the decision below does more than add to the burdens of public officials; it also creates a complex rule that will, in practice, be extraordinarily difficult to apply. It often will be unclear whether the defendant genuinely "acted in the shadow of legal uncertainty" (*Elliott*, 937 F.2d at 342), and thus has a proper appeal, or merely "ma[d]e * * * a stab at presenting a legal issue" (*ibid.*), and therefore does not. Since qualified immunity is a highly fact-specific inquiry (see *Anderson*, 483 U.S. at 641), and there is usually some dispute (whether material or not) about the facts, the parties and the court often will have to devote considerable effort to determining whether the defendant is really making an argument that he did not commit the acts alleged by the plaintiff. While this Court "has expressly rejected efforts to reduce the finality requirement of [28 U.S.C.] § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal" (*Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 439 (1985)), such a determination will be required for qualified immunity appeals after this decision.

In short, there is no basis in caselaw, logic, or public policy for the Seventh Circuit's holding. The issue is a recurring and important one. Further review therefore is in order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1994

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3777
Houston Jones,

Plaintiff-Appellee,

v.

Tyson Johnson, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 91 C 7095-**Joan B. Gottschall**, Magistrate Judge.

Argued May 10, 1994-Decided June 14, 1994

Before Eschbach, Easterbrook, and Kanne, Circuit Judges.

Per Curiam. Defendants have filed an interlocutory appeal to assert the defense of official immunity.

Although *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985), permits immunity appeals under the collateral order doctrine, we held in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), that defendants may urge only legal issues on such appeals. Accord, *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991); see also *Meyer v. Robinson*, 992 F.2d 734, 737-38 (7th Cir. 1993). A cry of "we didn't do it" does not present any distinctly legal issue

or seek protection from legal uncertainty, the genesis of doctrines of official immunity. To see that appellants are contending that they did not commit the acts of which plaintiff accuses them, one need not get beyond the first argument heading in their brief:

> WHERE NOT A SCINTILLA OF EVIDENCE EXISTS THAT ONE OR MORE OF THE DEFENDANTS, JOHNSON, DEEVEY OR PAYNE, EVER STRUCK, PUNCHED OR KICKED THE PLAINTIFF, OR EVER OBSERVED ANYONE DOING SO--EITHER IN THE PARKING LOT OR IN THE POLICE STATION--SAID DEFENDANTS ARE ENTITLED TO A SUMMARY JUDGMENT ON THE PLAINTIFF'S "EXCESSIVE FORCE" CLAIMS

Defendants do not deny that if they beat the plaintiff, as he believes they did, then they lack immunity. Whether they beat the plaintiff is a question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the defendants did not commit or abet battery.

The excessive force claim must be distinguished from the plaintiff's argument that the defendants lacked probable cause to arrest him. It is undisputed that an officer found plaintiff, apparently intoxicated, hitting his head against a building, and took him into custody. These facts imply disorderly conduct, which supports an arrest. Plaintiff contends that he was not drunk but was suffering from an insulin reaction, and that the police should have figured this out. The magistrate judge, presiding by consent under 28 U.S.C. §636(c), concluded that plaintiff had not adduced sufficient evidence to dispute the officers' version of the arrest--which, if accepted, entitles them to immunity if not to prevail outright. *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991); *Mahoney v. Kesery*, 976 F.2d 1054, 1057-59 (7th Cir. 1992). But the judge concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried.

This approach is mistaken. Summary judgement is not a discretionary remedy. If the plaintiff lacks enough evidence, summary

judgment must be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Immunity claims should be resolved as early in the case as possible-- and by the court rather than the jury. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliott*, 937 F.2d at 344-45. On the facts that this record presents, taken in the light most favorable to plaintiff, an arrest did not "violate clearly established . . .rights of which a reasonable person would have known". *Harlow*, 457 U.S. at 818. The three appellants therefore are entitled to qualified immunity on the false arrest claim.

The judgment on the false arrest claim is reversed, and the appeal is dismissed to the extent appellants seek review of the excessive force claim.

A true Copy:
Teste:

_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HOUSTON JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91 C 7095
	)	
VILLAGE OF VILLA PARK,	)	
a municipal corporation,	)	
JOHN HEIDELMEIER,	)	
TYSON JOHNSON,	)	
G. ESPOSITO,	)	
ROBERT DEEVEY, JOHN PAYNE,	)	
and STUART LUCADO,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants' motion for summary judgment. For the reasons set forth below, the motion is denied.

Background

The five individual defendants in this action under 42 U.S.C. §1983 are John Heidelmeier ("Heidelmeier"), Tyson Johnson ("Johnson"), G. Esposito ("Esposito"), Robert Deevey ("Deevey") and John Payne ("Payne"). All were police officers of the Village of Villa Park, Illinois ("Village") at the time of the events giving rise to this dispute. Village is named as a defendant only in plaintiff's pendent claims under state law. Since the commencement of this lawsuit, foul counts of plaintiff's ten-count complaint have been dismissed, including a claim against Village under §1983. Defendants now seek judgment in their favor on the

remaining counts of the complaint. The claims in question are the alleged violations of Fourth Amendment rights in Count I, and state law claims of false arrest, false imprisonment, malicious prosecution, assault and battery. Since those claims are apparently subsumed into the claim of "willful and wanton misco nduct" in Count V, that claim would not survive the dismissal of the other counts.

Facts relevant to this motion are few. It is undisputed that on November 6, 1990, Heidelmeier responded to a report of an apparently intoxicated man in or near an intersection in Village. Upon his arrival, Heidelmeier found plaintiff hitting his head or forehead against the door of a building. Heidelmeier then approached plaintiff in an attempt to ascertain whether there was a problem. From this point, the parties' versions of the facts diverge.

Heidelmeier states that when he asked plaintiff what was happening, plaintiff placed his hands in his pockets and began to fidget with something that later turned out to be a pocketknife in a scabbard. When Heidelmeier attempted a pat-down search, plaintiff struck him in the arms with a clenched fist. At that point, Heidelmeier decided to place plaintiff under arrest and he forced plaintiff to the ground in order to handcuff him behind his back. Heidelmeier could not accomplish this task alone because of plaintiff's struggling. In the interim, the other individual defendants had arrived on the scene and they assisted Heidelmeier in handcuffing plaintiff and placing him in a squad car. Defendants state that due to plaintiff's extreme resistance to their attempts to place him under arrest, it took the efforts of all five officers to control him.

Defendants contend that no one struck, beat or abused plaintiff while in the parking lot where he was arrested. Defendants Johnson, Payne and Deevey add that at that point their involvement in the arrest ended and that they saw no one abuse plaintiff at the police station either. PX D-F. Shortly after plaintiff arrived at the police station, paramedics were called. Plaintiff spent several days in the hospital for treatment of multiple trauma and several broken ribs. DX A at 76; PXF.

Plaintiff contends that he was experiencing an insulin reaction at the time of his arrest. His physician has testified that as a consequence, plaintiff's recollection of relevant events would be very poor and he would probably have been greatly weakened. However, in a small percentage of cases, a person undergoing an insulin reaction may show greater than normal strength. According to his doctor, during an insulin reaction, plaintiff could be coherent for brief periods of time and he could engage in conversation and control motor functions. The motor deficit would resemble that caused by intoxication. DX B at 5-21. Consistent with that testimony, plaintiff disclaims recollection of specific actions taken by defendants. However, he claims that he can recall experiencing extreme pain at various points, as when his arm was placed in an armlock and he was forced to the ground. Plaintiff denies having resisted the officers' efforts as they say he did, and he contends that the beating and verbal abuse continued after his arrival at Village's police station. Plaintiff's expert witness would testify that defendants used excessive force in the arrest and otherwise responded inappropriately to the little risk that plaintiff posed.

Plaintiff was charged with criminal offenses of disorderly conduct, battery and resisting arrest. At the time of his trial in the state court, plaintiff asserted the defense that he lacked the requisite mental state for the offenses charged. Plaintiff also testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed he was being dragged up the stairs of Village's police station. In the interim, he only remembered feeling a lot of pain. DX A at 69-70, 78. However, plaintiff recalled seeing Heidelmeier and Esposito while being beaten at the police station. DX A at 73-74, 83. Having heard each side's version of the events, and the medical testimony concerning the effects of an insulin reaction, the trial court found that plaintiff came into contact, struck, and resisted a peace officer. Although the judge found defendants' testimony credible and felt that all other elements of the charges against plaintiff had been proven, he concluded that the State had not proven beyond a reasonable doubt that plaintiff acted knowingly. The basis of the finding as to mental state was the testimony concerning plaintiff's diabetes and insulin shock. DX B at 30-33.

Claims of Excessive Force, Assault and Battery

The present motion for summary judgment asks the court to take into account plaintiff's inability to recall events that transpired prior to his arrival at the police station. Since plaintiff cannot recall specific details, only the individual defendants can provide eyewitness testimony concerning the circumstances of his arrest. All defendants having testified that no one beat or abused plaintiff, they ask the court to dismiss the claims of Johnson, Deevey and Payne. These three officers attest that they played no role in processing plaintiff after his arrest and plaintiff specifically recalls only Heidelmeier and Esposito. Plaintiff challenges the veracity of the three officers' affidavit testimony and observes that even if an officer did not actually participate in a beating, a jury may consider an excessive force claim against him if the officer stood by and allowed others to beat the plaintiff. *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Wilson v. City of Chicago*, 707 F. Supp. 379, 385 (N.D. Ill. 1989).

Regarding the claims against Heidelmeier and Esposito, defendants posit that the only competent testimony concerning the circumstances of the arrest is their own. Defendants argue that the court should not credit plaintiff's testimony, as his own doctor testified that he would not rely on anything plaintiff told him about the incident. Defendants further suggest that plaintiff should be estopped from taking a position in this litigation that is inconsistent with his defense to the criminal charges in the state court, but this court disagrees that such inconsistency exists. As already noted, plaintiff testified in the state court to feelings of great pain during the arrest and to some specific recollections of mistreatment at the police station. While present ability to recall in greater detail may diminish his credibility, there is no obvious contradiction of his former testimony such that his testimony cannot be considered here.

Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."' Fed.R.Civ.P. 56(c). In examining the record, all reasonable inferences from it are drawn in the light most favorable to the nonmovant. *Maxwell v. City of Indianapolis*,

998 F.2d 431, 433 (7th Cir. 1993). Plaintiff has the burden, however, of establishing a genuine issue for trial.

Applying these principles here, defendants are denied summary judgment on the claims of excessive force, assault and battery. Plaintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed.

Claims of Unlawful Arrest, False

Imprisonment and Malicious Prosecution

In moving for summary judgment on these claims, defendants rely on several propositions of law, all of which in themselves are correct. First, if defendants establish probable cause for plaintiff's arrest, his claims under §1983 of false arrest, false imprisonment and malicious prosecution necessarily fail. *Biddle v. Martin*, 992 F.2d 673, 678 (7th Cir. 1993); *Mark v. Furay*, 769 F.2d 1266, 1268-1269 (7th Cir. 1985). The existence of probable cause is also a defense to state law claims of false arrest, false imprisonment and malicious prosecution. *Myatt v. City of Chicago*, 816 F. Supp. 1259, 1267 (N.D. Ill. 1992) (citing *Mosley v. La Mastus*, 741 F. Supp. 724 (N.D. Ill. 1990)); *Jones v. Village of Villa Park*, 815 F. Supp. 249, 252-253 (N.D. Ill. 1993). Probable cause existed if at the moment of the arrest, the facts and circumstances within defendants' knowledge were sufficient to warrant a prudent man in believing that a crime was being or had been committed. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 537 (1991).

Besides challenging plaintiff's showing of probable cause, defendants raise qualified immunity as a defense. Qualified immunity shields law enforcement officers from damages if they "'reasonably but mistakenly conclude that probable cause is present.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). If a case involves questions as to whether probable cause existed to support officers' actions, the case should not be permitted to go to trial if there is *any* reasonable basis to conclude that

probable cause existed. *Biddle*, 992 F.2d at 676.[1] On the other hand, claims of qualified immunity are not susceptible to resolution on summary judgment if there is substantial overlap between the issue of immunity and the principal issue on the merits. *Maxwell v. City of Indianapolis*, 998 F.2d 431, 435-436 (7th Cir. 1993). *See also Meyer v. Robinson*, 992 F.2d 734, 737 (7th Cir. 1993). Thus, in a false arrest case, an officer might be denied summary judgment on a qualified immunity defense if the evidence raises questions as to whether a reasonable police officer would have found probable cause for an arrest. *See Maxwell*, 998 F.2d at 436; *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992). This result may obtain even if all officers involved in the arrest subjectively believe the arrestee is committing or has committed a crime. *Id.*

The establishment of probable cause for a disorderly conduct arrest requires only a reasonable belief that the arrestee's conduct threatened a breach of the peace. *See id.* at 677-678. While defendants maintain that the test is easily met here, again that contention rests on their own testimony. Plaintiff has not been able to summon eyewitness testimony to the contrary, but he has a sufficient explanation for his inability to do so. Plaintiff has also presented evidence that, at the time of his arrest, he may have been weakened by the insulin reaction and unable to summon the level of resistance that defendants claim he did. If obviously weakened, it is conceivable that no reasonable officer might have found cause for arrest. Plaintiff's inability to recall is potentially more detrimental to his claims of lack of cause to arrest than it is to his claims of excessive force, since the fact of his injuries supports an inference of excessive force used. As determined above, the excessive force claims must be tried. Since there is substantial overlap between the claims of excessive force and lack of probable

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[1] Qualified immunity may also apply in cases of excessive force claims under §1983. *See Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993). In such cases, a plaintiff may not base his claim on mere speculation that force was excessive. *Id.* at 1175. However, the plaintiff may avoid the application' of qualified immunity if he can show that the force used was so excessive that officers should have been on notice that they were violating the Fourth Amendment. *Id.* at 1174.

cause, and because there is at least some possibility plaintiff could prove lack of probable cause, the court will deny summary judgment on the question of probable cause to arrest.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is denied.

ENTER:

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: October 26, 1993